

Atty Gen. Op. No. 10 - IB11

JOSEPH R. BIDEN, III
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
NEW CASTLE COUNTY
820 NORTH FRENCH STREET
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400
FAX (302) 577-6630
CRIMINAL DIVISION (302) 577-8500
FAX (302) 577-2496
FRAUD DIVISION (302) 577-8600
FAX (302) 577-6499
TTY (302) 577-5783

September 8, 2010

Ms. Patricia Wright
19 Patriots Way
Rehoboth Beach, DE 19971

**RE: Freedom of Information Act Complaint
Against Dewey Beach**

Dear Ms. Wright:

On August 9, 2010 you sent the Delaware Department of Justice (DDOJ) a Freedom of Information Act (FOIA) complaint concerning the Town of Dewey Beach ("Town"). On August 23, 2010 we received the Town's timely response. This is the DDOJ determination of your complaint pursuant to 29 *Del. C.* § 10005(e).

FACTS

Your complaint raises about fourteen points, all pertaining to the executive sessions held by the Town Council on March 13, May 8 and 31, June 4 and 11, 2010. The points will be set forth and addressed in the "DISCUSSION," below.

RELEVANT STATUTES

While all meetings of a quorum of a public body must be open to the public, 29 *Del. C.* § 10004(a),

[a] public body may hold an executive session closed to the public upon affirmative vote of a majority of members

present at a meeting of the public body. The vote on the question of holding an executive session shall take place at a meeting of the public body which shall be open to the public, and the results of the vote shall be made public and shall be recorded in the minutes. The purpose of such executive sessions shall be set forth in the agenda and shall be limited to the purposes listed in subsection (b) of this section. Executive sessions may be held only for the discussion of public business, and all voting on public business must take place at a public meeting and the results of the vote made public.

29 *Del. C.* § 10004(c). It is permissible to hold an executive session for “[s]trategy sessions, including those involving legal advice or opinion from an attorney-at-law, with respect to collective bargaining or pending or potential litigation, but only when an open meeting would have an adverse effect on the bargaining or litigation position of the public body.” 29 *Del. C.* § 10004(b)(4).

DISCUSSION

Your complaint refers to deficiencies in “draft minutes,” but there is no FOIA requirement as to the contents of draft minutes, therefore the Town’s draft minutes do not violate FOIA. Your complaints as to deficiencies in final minutes will be addressed below. You point out that the agenda for the March 13 and June 11, 2010 meetings allotted an hour to an hour and a half for executive session. It is unclear whether you are complaining that FOIA was violated by the amount of time indicated for executive sessions, but there is no FOIA requirement as to how much time should be allowed for an executive session, therefore the time provided on the agendas does not violate FOIA.

You allege a violation of FOIA because the video recording of the June 11, 2010 meeting does not depict the portions of the meeting where Town Council moved into and out of executive session. FOIA does not require that a public body video record its public meetings. The Town prepares written minutes in accordance with FOIA, and does not use the video recordings of the public meetings to substitute for the written minutes. Consequently, the exclusion of certain portions of the meeting from the video recording is not a violation of FOIA. You allege the Town refused to provide copies of executive session minutes to "a member of the public," but this is not enough information for the DDOJ to determine whether FOIA was violated. We note that executive session minutes do not have to be made public if disclosing them would "defeat the lawful purpose of the executive session." 29 Del. C. § 10004(f).

You question whether the matters discussed in the executive sessions of March 13, May 31, and June 4 and 11, 2010 were, in fact, proper under FOIA. You do not have any information that they were not, and the DDOJ does not require a public body to explain its actions when a complaint is based on mere conjecture. *Op. Att'y Gen. 09-IB10*, 2009 WL 4810671, at * 2 (Del. A.G. Nov. 23, 2009). Nonetheless, the Town has responded that the during the executive sessions the Town Council conducted "strategy sessions . . . involving legal advice or opinion" from the Town's attorneys, that if conducted in open session, "would have [had] an adverse effect on the . . . litigation

position” of the Town. Additionally, Town Council did not take any votes during the executive sessions.

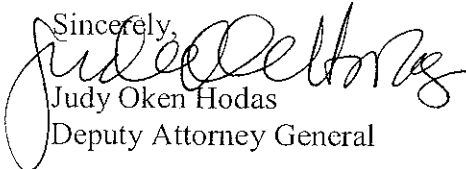
The Town has conceded that the minutes of the June 11, 2010 Town Council meeting “reflect a motion and a vote to go into executive session, but no reason for this session.” Technically, FOIA does not require that the reason for an executive session be announced at the public meeting or that it be memorialized in the meeting minutes. Rather, FOIA only requires that a vote to conduct an executive session be recorded in the minutes and that a permissible reason for the executive session be identified on the meeting agenda—which the Town did. Although FOIA does not technically require that the reason for the executive session be included in the minutes, best practices dictate that the reason for the executive session be announced during the public meeting and that the reason be included in the meeting minutes. On August 21, 2010, the Town took remedial action at a properly noticed meeting and amended the minutes of the June 11, 2010 meeting to reflect that the executive session was for the purpose of discussing the litigation pending against the Town.

The Town agrees that the March 13 and May 8, 2010 meeting agendas each included an executive session but no reason for the executive session. Also, as you indicate, the minutes of those meetings “show a motion to leave executive session but no public motion to move into executive session and the reason therefore.” As previously noted, FOIA might not technically require that the reason for an executive session be

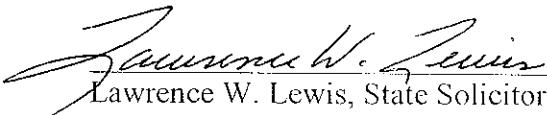
announced at the public meeting or be memorialized in minutes. However, on August 21, 2010 the Town took remedial action by conducting a properly noticed meeting and amending the minutes of the March 13 and May 8, 2010 meetings to reflect the result of the public vote to move into executive session and to reflect that the executive session was for the purpose of discussing the litigation pending against the Town.

CONCLUSION

For the reasons given, we find that although the minutes of some Town Council meetings technically violated FOIA, the Town has amended the relevant minutes and therefore no remediation is necessary.

Sincerely,

Judy Oken Hodas
Deputy Attorney General

APPROVED:


Lawrence W. Lewis, State Solicitor

cc: FOIA Coordinator
Glenn C. Mandalas, Esquire